BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

IN THE MATTER OF
U S WEST COMMUNICATIONS, INC.'S
COMPLIANCE WITH SECTION 271 OF THE
TELECOMMUNICATIONS ACT OF 1996

Docket No. T-00000A-97-238

QWEST CORPORATION'S COMMENTS ON RECOMMENDED OPINION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE ON QWEST'S PERFORMANCE ASSURANCE PLAN

April 17, 2002

Qwest Corporation ("Qwest") respectfully submits these comments on the Administrative Law Judge's ("ALJ") Recommended Opinion and Order on Qwest's Performance Assurance Plan ("Recommended Decision"), released on April 4, 2002.[1]

INTRODUCTION

Qwest addresses below the specific issues raised by the ALJ's Recommended Decision. At the outset, however, Qwest outlines the governing FCC standards for review of Qwest's performance assurance plan ("QPAP"), and the way in which Qwest has designed its plan to conform to those standards.

A. The FCC's "Zone of Reasonableness" Standard for Review of the QPAP

One of the requirements for section 271 relief by the FCC is that the BOC demonstrate that its provision of interLATA service will be "consistent with the public interest, convenience, and necessity."[2] As with other section 271 applications, the QPAP is submitted as probative evidence of satisfaction of one of three criteria established under that standard by the FCC: that once Qwest satisfies the checklist criteria for opening up its local markets to competition, it will not "backslide" from that showing.[3] The FCC has made clear, however, that such a plan is not the only basis for concluding that the BOC will have adequate incentives against "backsliding" given the prospect of

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[1] Recommended Opinion and Order of the Hearing Division on Qwest's Performance Assurance Plan, *In the Matter of U.S. WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238 (Apr. 4, 2002) ("Recommended Decision").

[2] 47 U.S.C. § 271(d)(3)(C).

[3] *See* Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 429 (1999) ("Bell Atlantic New York Order"), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

other remedial action — including possible revocation of its authority to offer long distance service to its Arizona customers after such service is initiated.[4]

In discussing similar plans submitted by other BOCs, the FCC has emphasized that a plan is appropriate if it falls within a "zone of reasonableness."[5] A plan meets this test if it has five general characteristics:

- potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- a reasonable structure that is designed to detect and sanction poor performance when it occurs;
- a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal;
- and reasonable assurances that the reported data is accurate.[6]

The "zone of reasonableness" standard means that "there is no one way to demonstrate assurance."[7] It thus gives BOCs flexibility in how to structure their plans, although the FCC's section 271 decisions do provide guideposts for what has been deemed acceptable. The question before this Commission is whether the plan *submitted by Qwest* meets these criteria, not whether another plan may be preferred by other Commissions.[8] Because, as discussed in prior pleadings and below, the QPAP's core

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4 *Id.* ¶ 430.

5 *Id.* ¶ 433.

6 *Id.*

7 Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988 ¶ 240 (2001) ("Verizon Massachusetts Order").

8 The FCC's statement in the *Verizon Pennsylvania Order* that plans may vary from state to state, *see* Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419 ¶ 128 (2001), is not to the contrary. That order simply stated the truism that plans need not be identical in every state. It

elements have already been approved in previous section 271 applications, Qwest believes that the QPAP it has filed in this state will be acceptable to the FCC and is in the public interest.

B. Qwest's Design of the QPAP to Conform to That Standard

The QPAP was initially modeled closely upon a similar plan proposed in Texas by Southwestern Bell, as approved by the Texas Commission and the FCC. It was thereafter further evaluated through a comprehensive review that has been reflected in an extensive evidentiary record. It was examined and modified in a collaborative process, involving Staff and CLECs as well as Qwest. During a series of workshops, Qwest modified the structure of its plan to address issues raised by Staff and CLECs, adding, for example, a significant number of additional performance measurements and agreeing to provide for root cause analysis and CLEC-initiated audits. As Staff indicates, "[t]hroughout the workshop process, Qwest has revised and modified its proposed PAP."[9]

Qwest continued to offer modifications after the Arizona workshops concluded. Through its Reply Brief, Qwest offered to incorporate the significant changes it had agreed to in a multistate review of the PAP. At Staff's request, Qwest formally filed an amended QPAP incorporating the offered changes.[10]

The resulting plan fully satisfies the FCC's five criteria. First, Qwest will place approximately 36% of its 1999 ARMIS net return for local service in Arizona ($72

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does not mean that a BOC offering a plan that conforms to prior FCC-approved plans can be treated differently from those other BOCs without any reason based on unique circumstances in its state.

[9] *See* Proposed Staff Report on Qwest's Performance Assurance Plan, *In the Matter of Qwest Corporation's Section 271 Application*, Docket No. T-00000A-97-0238 (Oct. 29, 2001) ¶ 34 ("Staff's Proposed Report").

[10] Qwest's Submission of Revised Performance Assurance Plan at 2, n.1.

million) at risk under the Arizona QPAP.[11] The FCC has *repeatedly* found that placing this level of net revenues at risk provides a "meaningful incentive" for a BOC to maintain a high level of performance.[12] Thus, by adopting this FCC-endorsed incentive to comply with performance standards, the QPAP satisfies this prong of the FCC's reasonableness test.

Second, a PAP should contain clearly articulated and predetermined measures and standards that encompass a wide range of carrier-to-carrier performance. The QPAP's enforcement measures, the Performance Indicator Definitions ("PIDs"), were developed during months of collaboration with CLECs and the Arizona Commission Staff in the Arizona Section 271 Operational Support System ("OSS") technical advisory group ("TAG") meetings. The PIDs included in the QPAP are comprehensive. They cover the entire range of gateway, pre-order, order, service provisioning, repair, network performance, and billing functions for resale, transport, unbundled loops, and other wholesale services.

Third, the QPAP provides a reasonable structure that is designed to detect and sanction poor performance when and if it occurs. The QPAP started with the statistical methodology and payment structure of the Texas PAP approved by the Texas commission and the FCC, and, as noted below, Qwest has made further improvements to that Texas PAP.

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[11] Qwest Corporation's Brief on Performance Assurance Plan Issues in the State of Arizona, *In the Matter of Qwest Corporation's Section 271 Application*, ACC Docket No. T-00000A-97-0238, filed May 10, 2001, at 16 ("Qwest's QPAP Brief").

[12] *See Bell Atlantic New York Order* ¶ 433; *SBC Texas Order* ¶ 424; Memorandum Opinion and Order, *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237 ¶ 274 (2001) (D.C. Cir. Dec. 28, 2001) (subsequent history omitted) ("SBC Kansas/Oklahoma Order").

Fourth, the QPAP contains a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal. The QPAP provides self-executing payments (meaning that Qwest's obligation to make payments is triggered automatically, without a hearing as to either liability or damages) both to the CLECs (Tier 1 payments) and the states (Tier 2 payments), based on monthly performance results. There are only limited exceptions to Qwest's obligation to make payments. These exceptions are based on and consistent with provisions in the FCC-approved PAPs for Texas, Kansas, Oklahoma, Arkansas, and Missouri.

Finally, the QPAP provides reasonable assurance that the reported data are accurate. The QPAP contains extensive CLEC data validation and auditing safeguards that are patterned after those in other FCC-approved PAPs.[13] The performance measurements have undergone not one, but two separate, comprehensive audits of the data collection, calculation, and reporting functions, by two different independent auditors.[14] As a result, the QPAP performance measurements have been vigorously reviewed and will continue to be subject to scrutiny.

C. The Prior Arizona Proceedings on the QPAP

From July 2000 to April 2001, the parties took part in seven workshops at which many of the basic parameters of the QPAP were agreed upon. On April 26, 2001, Staff circulated a final "Issues List" containing the sixteen issues that were not resolved in the

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[13] *See Bell Atlantic New York Order* ¶ 442; *SBC Texas Order* ¶ 428; *SBC Kansas/Oklahoma Order* ¶ 278; *Verizon Massachusetts Order* ¶ 247.

[14] The performance measures included in the QPAP were audited both by Cap Gemini Ernst & Young in the Arizona collaborative, as well as by Liberty Consulting Group in the ROC OSS collaborative.

workshops.[15] *At the request of Staff*, Qwest also agreed to provide as an alternative in Arizona the modifications it had made to the plan it was offering in the Regional Oversight Committee Post Entry Performance Plan collaborative ("ROC PEPP"). Qwest filed a revised QPAP incorporating those changes on July 3, 2001.[16]

Staff released its proposed QPAP report on October 29, 2001.[17] Apart from Qwest, only WorldCom filed comments in response to that proposal.[18] Staff then filed its final QPAP report[19] on December 24, 2001, and Qwest and WorldCom filed comments on that report soon afterwards.[20]

The ALJ's Recommended Decision being addressed here proposes resolutions to each of the sixteen disputed issues on the Issues List. Certain of these proposals endorse Qwest's positions, and Qwest is prepared to accept certain others. Qwest confines these comments to the remaining issues, where it believes that Staff's proposals and the ALJ's recommendations substantially depart from positions previously found by the FCC to be well within its "zone of reasonableness." Among these are certain proposals critical to the fundamental architecture of the QPAP. These include, most notably, whether each of

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15 *See* Email from Maureen A. Scott, mscott@cc.state.az.us, to workshop participants, regarding "Final AZ PAP Issues List" (Apr. 26, 2001) ("Issues List").

16 *See* Qwest's Submission of Revised Performance Assurance Plan, *In the Matter of U.S. WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238 (July 3, 2001) ("Qwest's July 2001 Submission").

17 *See* Staff's Proposed Report.

18 *See* Qwest Corporation's Comments to the Proposed Staff Report on Qwest's Performance Assurance Plan, *In the Matter of U.S. WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238 (Nov. 8, 2001).

19 See Staff's Final Report on Qwest's Performance Assurance Plan, *In the Matter of Qwest Corporation's Section 271 Application*, Docket No. T-00000A-97-0238 (Dec. 24, 2001) ("Staff's Final Report").

20 *See* Comments of Qwest Corporation on Staff's Final Report on Qwest's Performance Assurance Plan, *In the Matter of U.S. WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238 (Jan. 8, 2002) ("Qwest's Comments on Final Report").

the plan provisions can be rewritten by the Commission notwithstanding Qwest's reliance on those provisions as a basis for compromises to which it has agreed on many others. Such proposals also involve the question of whether the guaranteed payments to CLECs under the plan have any meaning (or whether they are simply a floor for litigation of higher amounts), as well as the basic statistical methodology, classification and payment levels, and audit mechanism included in the plan.

Qwest addresses each of these disputed issues below. However, it is important to emphasize two fundamental deficiencies in the ALJ's Recommended Decision. First, in its comments on Staff's proposed as well as its final report, Qwest noted that Staff had rejected QPAP provisions modeled, as noted above, on SBC plans previously approved by the FCC as falling well within its "zone of reasonableness." Both Staff and the ALJ, however, have not provided any support for disregarding these concerns. Second, the ALJ has accepted Staff's efforts to selectively pick apart Qwest's July 3 compromise — solicited from Staff itself — to generate CLEC-favorable provisions while ignoring what Qwest received in return for agreeing to those provisions. Absent consent by Qwest, this one-sided rewrite has no support in the record. As the Multistate Facilitator recognized, "where agreement was reached through compromise, we needed to be careful not to support an improvement in what [a] party got without considering what had been given in return, . . . lest we risk disrupting important balances."[21]

Qwest respectfully asks the Commission to reject Staff's unbalanced approach to this process, endorsed by the ALJ, and find that Qwest's positions on the impasse issues

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[21] Report on Qwest's Performance Assurance Plan, *In the Matter of the Investigation into US WEST Communications Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. D2000.5.70, Oct. 22, 2001, at 2 ("Multistate Facilitator's Report").

described below and current QPAP proposal fully satisfy the FCC's "zone of reasonableness" standard for an acceptable performance plan.

DISCUSSION

Disputed Issue No. 3: Root Cause Analysis

The QPAP provides in certain contexts for Qwest to undertake a "root cause" analysis of the reasons why it has failed to meet a standard in the plan. Although Qwest will have substantial incentive to identify the causes of PID misses and to take corrective action,[22] Qwest's plan nonetheless commits to initiate such root cause analysis after any second consecutive Tier 2 miss to determine the cause of the miss and to identify the action needed to meet that standard.[23] Moreover, although it is unclear from the Recommended Decision whether the ALJ acknowledges the commitment, the Qwest plan also extends the initiation of such analyses to aggregate Tier 1 measures for which no Tier 2 counterparts exist.[24] As the ALJ appears to recognize, the prospect of having to conduct more frequent root cause analyses at the discretion of CLECs and the Commission without any demonstration of any pattern of noncompliance is unreasonable; as it acknowledges, "a two-month failure for a performance measure is a reasonable trigger."[25] Based upon Qwest's commitment to initiate root cause analyses in both Tier 1

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22 This incentive arises both from the significant payments that the PAP requires when misses occur, and, as the FCC has recognized, from the prospect of substantial FCC and other remedies for conduct found to be inconsistent with the terms of its section 271 authorization, including potentially loss of Qwest's authorization to provide long distance service to its Arizona customers. *See Bell Atlantic New York Order* ¶ 430.

23 *See* Qwest's QPAP Brief at 8.

24 *See* QPAP § 15.3.

25 Recommended Decision ¶ 44.

and Tier 2 contexts under what has been deemed to be an appropriate trigger, there is no supported basis for additional requests, particularly at the discretion of CLECs.

Finally, with respect to the ALJ's request for disclosure of root cause analyses,[26] Qwest has no objection to posting on its website the findings of a root cause analysis and a description of the corrective action taken, as long as it is not required to disclose confidential and proprietary information.

Disputed Issue No. 4: K-Table

Like all other plans submitted to the FCC, the QPAP payment scheme provides for payments based upon a comparison of differences in service to Qwest's retail customers and its wholesale customers (*i.e.*, CLECs). In order to distinguish in this context between true differences and those that are simply the result of random variation, Qwest originally proposed including in the QPAP the K-table, which was derived from the FCC-approved Texas PAP[27] and developed by AT&T and WorldCom in another proceeding.[28] Qwest and the Arizona workshop participants spent considerable time discussing the merits of the K-table, and Qwest accordingly made changes to the K-table which the CLECs believed improved the operation of the table over even the FCC-approved Texas plan. The CLECs, however, continued to object even to the revised K-table, and so by the end of the workshops the parties had reached an impasse on this issue.[29]

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26 *Id.*

27 *See* Qwest's QPAP Brief at 11-13.

28 *See* Staff's Final Report ¶ 108.

29 *See* Issues List at 2.

In separate workshops in the multistate process, Qwest and CLECs agreed to a compromise in which Qwest agreed to eliminate the FCC-approved K-table in exchange for the use of specifically negotiated critical values that varied based upon type of measurement and sample size. Indeed, AT&T found Qwest's multistate proposal attractive enough that it requested the record be re-opened in a Michigan PAP proceeding (relating to another BOC's PAP) so that AT&T could offer that proposal in Michigan.[30]

Upon Staff's request, Qwest agreed to file in Arizona the terms of this ROC PEPP compromise as a means of resolving the impasse issues here.[31] Staff's approach to that accommodation by Qwest was to completely rewrite this ROC PEPP compromise to its own liking, so as to propose a CLEC-favorable statistical measure that has no support in the record of this case or in any acceptable standard of statistics.

In its Proposed Report,[32] Staff rejected *both* the K-table *and* the ROC PEPP proposal, and instead advanced a wholly new critical values table that was not included in or reviewed as a part of the record. As Qwest noted in its comments on the Proposed Report, Staff selectively adopted the portions of the ROC PEPP compromise proposal that it liked, while discarding the elements it did not. Staff dismissed Qwest concerns about this ploy, and in its Final Report continued to recommend adoption of its new table.[33] Staff acknowledged and "appreciate[d]" the efforts of Qwest and others to reach this compromise, but stated — without acknowledging its *own* role in soliciting Qwest's compromise offer — that this Commission is not "obligated in any way to adopt

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30 *See* Letter from John J. Reidy, III & Douglas Trabaris, counsel, *AT&T Communications of Michigan, Inc.*, to Dorothy F. Wideman, Executive Secretary Division, *Michigan Public Service Commission* (June 26, 2001).

31 *See* Qwest's July 2001 Submission at 2-3.

32 *See* Staff's Proposed Report ¶¶ 104-06.

arguments from other jurisdictions without significant and critical review."[34] And Staff did not simply dismiss the compromise and readopt the K-table. It continued to pick the agreement apart in ways fundamentally inconsistent with its nature as a compromise, and without the "significant and critical" review it argues is necessary to adopt such concepts.

Qwest again objected to this approach in its comments on the Final Report, and the ALJ has continued to ignore them.[35] The ALJ's insistence on the inclusion of Staff's rump version of the ROC PEPP statistical compromise is arbitrary, capricious, and wholly without record support. No other ROC PEPP state has rejected Qwest's compromise, and the ALJ offers no compelling reason for abandoning it now. The ALJ now simply asserts without explanation that Staff's proposal "strikes a good and reasonable balance between the interests of Qwest, the CLECs, and the public."[36] In fact, as noted above, that proposal is the antithesis of "balance": it took a truly balanced compromise and completely rewrote it to the detriment of Qwest. In the ROC PEPP proposal, Qwest agreed to accept a lower critical value (1.04) for specific products and measures that were important to CLECs, in exchange for higher critical values in others. In other words, Qwest compromised by accepting a much lower confidence level for these measures (approximately 85%) in exchange for a much higher confidence level on others (97-100%). Staff took the first half of the compromise, the 1.04 critical value for some measures, and then abandoned the second half, leaving a totally unfair and one-sided proposal. Given that Qwest only submitted the ROC PEPP compromise proposal at

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33 *See* Staff's Final Report ¶ 121.

34 *Id.*

35 *See* Recommended Decision ¶ 50.

36 *Id.*

Staff's specific request, as a good faith attempt to reach a final agreement, the ALJ actions are particularly troubling.

Indeed, the very nature of the compromise submitted by Qwest belies any record support for its individual pieces. The ALJ suggests that "an approximately 15 percent chance of wrongly concluding that Qwest is not providing parity" (associated with the 85% confidence level for the 1.04 critical value) is not unreasonable because Qwest might only have to pay a small amount to the low volume CLECs governed by that critical value.[37] The assertion that an 85% confidence level is somehow normal or acceptable is totally without record support, and there is no record support for the notion that this flaw should be accepted simply because it may not occur very often. In fact, the minimum confidence level commonly accepted in the industry is *95%*.[38] As discussed above, Qwest only agreed to an *otherwise wholly unjustifiable* 85% level for small sample sizes *in exchange for higher confidence levels at higher volumes* — which will be increasingly important to Qwest as the rate of local competition grows. There is no basis in the record to disregard accepted statistical measures of reliability in the absence of doing so as part of such an overall compromise. Unless the Commission accepts that compromise, the only alternative supported by the record is the K-table Qwest included in its original QPAP. That approach has already been approved by the FCC as part of SBC's plan for Texas,[39] and none of the parties to this proceeding introduced any

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37 *Id.*

38 For example, the K-table developed by AT&T and WorldCom is based on a 95% confidence level. *See* Qwest's QPAP Brief at 12.

39 *See* Texas PAP § 2.0.

evidence during the workshops demonstrating that the K-table would be unfair or inadequate.[40]

Disputed Issue No. 7: Duration Factors

The QPAP proposed in Arizona contains two payment tables that determine the amount Qwest must pay for each occurrence of non-conforming performance. One table applies to Tier 1 measurements (for payments made to CLECs), and the other applies to Tier 2 measurements (for payments made to the state). As in all of the FCC-approved SBC plans, the QPAP's Tier 1 payments escalate, while the Tier 2 payments do not. This established distinction thus lies well within the FCC's "zone of reasonableness." Because Tier 1 payments are viewed as compensatory to CLECs, limited escalation is appropriate. Because Tier 2 payments are viewed as incentive payments that are in addition to Tier 1 payments, escalation is not appropriate.

This issue was never disputed in the workshops, and it was not challenged by Staff in its proposed report. In its Final Report, Staff stated for the first time that it "advocates payment escalation for both Tier 1 and Tier 2 payments."[41] In its comments on that proposal, Qwest demonstrated that Tier 2 escalation had never been in any of the SBC PAPs approved by the FCC, had never been discussed by the parties in the Arizona workshops, had not been included on Staff's "Final Issues List" described above, and was not included in Staff's Proposed Report.[42] Staff's eleventh hour change of position is

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40 *See* Qwest's QPAP Brief at 9-14.

41 *See* Staff's Final Report ¶ 155.

42 *See* Qwest's Comments on Final Report at 17.

thus unfair, unreasonable, without record support, and wholly inconsistent with FCC precedent.[43]

While the ALJ acknowledges Qwest's objections to Staff's proposal in its Recommended Decision,[44] she simply ignores them.[45] Indeed, the ALJ's *only* explanation in the Recommended Decision for ratcheting up the Tier 2 payment levels is to give Qwest some "extra incentive" — even as she acknowledges that it does not have any "actual experience" to guide its recommendation.[46] In fact, Qwest is already required to make significant Tier 1 and Tier 2 payments under the QPAP: Qwest has demonstrated that, after six months of non-compliant performance, QPAP payments would greatly exceed total revenues for most services.[47] Thus, with the existing Tier 2 per occurrence payments of $200, $300, and $500, Qwest will have substantial incentive to fix any non-compliant service. Because neither the ALJ nor Staff has made any attempt in the fact of this data to demonstrate with concrete data that escalated Tier 2 payments are necessary to ensure compliance, the ALJ's recommendation is entirely arbitrary and must be rejected.

Disputed Issue No. 9: Classification of Measurements

The Arizona QPAP, like the Texas plan and its progeny, contains an attachment identifying the performance measurements that are in the plan and the classification of each measurement. The QPAP classifies each performance measurement into one of

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43 *Id.*

44 *See* Recommended Decision ¶ 67 ("Qwest believes that because Staff did not include the escalation in its Proposed Findings, it is unfair").

45 *Id.* ¶ 68.

46 *Id.*

47 *See* Qwest's Brief at 20.

three categories — "high," "medium," and "low" — that correspond to various payment levels based on the relative importance of the measurement. These classifications were discussed in the Arizona workshops and impasse issues were identified.[48] As with the statistical methodology described above, here Staff asked Qwest to offer in Arizona a compromise it had reached with CLECs in the ROC PEPP collaborative. In that compromise, Qwest had offered to reclassify some of the QPAP's Tier 1 measures from "medium" to "high," *while, at the same time, reclassifying some of the Tier 2 measures from "high" to "medium."* This offer was adopted at the request of multistate commission staff members, and its purpose had been to shift some of the QPAP payments from the state (via the Tier 2 payments) to the CLECs (via Tier 1).

As with the K-table described above, Staff simply divided Qwest's compromise in half, accepting the first part of the proposal and rejecting the second.[49] The ALJ now accepts Staff's proposal.[50] As Qwest pointed out in its comments on Staff's Final Report, selectively borrowing from Qwest's attempt to compromise is wholly unbalanced, other than as a "more is better" philosophy. It also ignores the FCC's repeated cautions that its ultimate goal is to promote facilities-based competition, not CLEC subsidy schemes.[51]

The ALJ attempts to justify this proposal by asserting that the Commission has the authority to impose the QPAP on Qwest without Qwest's consent on any terms its

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48 *See* Issues List at 3.

49 *See* Staff's Final Report ¶¶ 181-83.

50 *See* Recommended Decision ¶ 79.

51 *See, e.g.,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 ¶ 110 (1999) ("Third Report and Order").

prefers, so as "to encourage Qwest's compliance with the 1996 Act."[52] As discussed in greater detail below, section 271 does not confer any such authority on state commissions. Indeed, while the FCC encourages state review of such plans, the Act itself does not extend the statutory consultative role for states to the QPAP — or anything else not included in section 271(c).[53] But in any event, the ALJ has made absolutely no effort to explain how ratcheting up the payment amounts will accomplish the Commission's goal of "encouraging Qwest's compliance." She cites no evidence to support the notion that the measurement classifications proposed by Qwest (and previously accepted by the FCC) will fail to give Qwest adequate incentive, together with the other remedies relied upon by the FCC, to meet its obligations under the 1996 Act. Without such evidence, the ALJ's proposed classification scheme should be rejected. If the Commission chooses not to accept Qwest's ROC PEPP compromise for the classification of the measures, Qwest's original classification proposal should be reinstated.

Disputed Issue No. 11: Audits

Section 15.0 of the QPAP contains an audit mechanism to ensure that the QPAP reports are accurate. The QPAP provides for an independent audit of the financial system that will be "initiated one year after the effective date of the PAP," and a second audit to

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[52] *See* Recommended Decision ¶ 79. Staff also suggested in its Final Report that, because Qwest's compromise proposal was not fully accepted by all of the parties in the ROC, Staff can pick and choose whichever pieces of the offer it likes. *See* Staff's Final Report ¶ 183. That argument makes no sense; regardless of whether that compromise represents an ironclad agreement in the ROC, Qwest has offered it here in toto. As noted above, there is no record support for accepting the half of Qwest's proposal favoring CLECs, and rejecting the half that does not.

[53] *See* 47 U.S.C. § 271(d)(2)(B).

be initiated 18 months later.[54] Qwest will choose and pay for the auditor.[55] The QPAP also permits CLECs to request an independent audit in the event of a dispute between Qwest and the CLEC regarding the accuracy of the reported data.[56] WorldCom proposed an entirely different approach to QPAP audits,[57] but Staff rejected that proposal and found that Qwest's audit proposal was sufficient.[58]

In its Recommended Decision, the ALJ largely agrees with Staff's proposal, finding that "Qwest's proposed audit procedures appear sufficiently rigorous to ensure Qwest is providing valid data and complying with the terms of the PAP."[59] The ALJ, however, also recommends that "[t]he Commission should also retain the ability to conduct its own audit or engage the services of a third-party auditor if Staff determines that it would be in the public interest."[60] Qwest takes exception to this proposal. It would give the Commission *carte blanche* to conduct audits using Tier 2 funds to pay for third party auditors,[61] and would threaten if uncoordinated to allow fourteen different audits conducted independently by fourteen different states. If the Commission wants to use Tier 2 funds for QPAP administration, then the details and parameters of the use of those funds should be specified.

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54 QPAP § 15.1.

55 *Id.*

56 *Id.* § 15.2.

57 *See* Staff's Proposed Report ¶¶ 166-167.

58 *Id.* ¶ 169.

59 Recommended Decision ¶ 94. Qwest notes that it is not opposed to modifying section 15.1 of the QPAP to provide that the auditor chosen by Qwest must be approved by the Commission.

60 *Id.*

61 Of course, the Commission would still retain its authority under state law to conduct its own investigations into the QPAP.

Qwest argued in its comments on Staff's Final Report that, if the QPAP provides for third party audits conducted at the direction of the Commission or CLECs, such audits must be conducted by the same auditor and must not be duplicative or redundant of any other audits, including audits planned or conducted by any other state or the multistate integrated audit program. There should also be some appropriate standard for initiating even a non-duplicative audit, such as a requirement that audits be conducted only on performance measurements that have a high degree of inaccuracy and are determined to be material to the QPAP as well as a limit of how often even non-duplicative audits could be conducted, such as over the course of two-years as recommended by the multistate Facilitator. This type of audit could be implemented by revising section 15.1 of the QPAP as follows, to provide the Commission with authority to approve the auditor, while establishing some reasonable standards in the scope of the audit:

> **15.1** Qwest will select an independent auditor, subject to Commission approval, from among the national firms with experience in testing and auditing the ILEC OSS and/or performance measurements and metrics to design a plan to identify and audit performance measurements in the PAP that have a high risk of inaccuracy and are material. The audit of these measurements will occur over two years and will be funded from the Special Fund as described in section 11. The need for the inclusion of any measurement in this program must be substantiated by the Liberty Audit Report. In addition, the same auditor shall be retained to audit measurements that change from substantially manual to substantially mechanized measurements. The same auditor will also be chosen to conduct all CLEC audits provided for under the PAP. None of the audits conducted pursuant to the PAP shall be duplicative or redundant of any other audit conducted in another state or by CLECs. All audits pursuant to this paragraph shall be coordinated with other state audits, any regional audit, or CLEC audits in order to avoid duplication and interference with Qwest's ability to comply with the provisions of the PAP, and shall be of a nature and scope that it can be conducted within the reasonable course of Qwest's business. Qwest shall not be required to audit more than three performance measurements at the same time, and Qwest's resources shall be allocated first to any ongoing regional audits.

15.2 Qwest will create a separate financial system which will take performance results as inputs and calculate payments according to the terms of the PAP. An independent audit of this financial system shall be initiated one year after the effective date of the PAP and a second audit shall be started no later than 18 months thereafter. The auditor ~~will be chosen and paid for by Qwest~~ shall be the same auditor selected for the 'two-year' audit of performance measurements and shall be funded from the Special Fund as described in section 11. Alternatively, the Arizona Commission staff may choose to conduct this audit itself. The necessity of any subsequent audits of the financial system shall be considered in the six-month PAP reviews, based upon the experience of the first two audits. If as a result of the audit, it is determined that Qwest underpaid, Qwest will add bill credits to CLECs and/or make additional payments to the State to the extent that it underpaid. In the event Qwest overpaid, future bill credits to CLECs and/or future payments to the State will be offset by the amount of the overage. All under and over payments will be credited with interest at the one year U. S. Treasury rate.

As an alternative to audit provisions contained in section 15.0 of the current QPAP, the Commission could join the regional audit conducted by all of the states in Qwest's region. Qwest has previously argued that the state as well as the parties to the QPAP should benefit from participation in the regional audits. Because Qwest's processes for producing performance results are not unique among the states in the region, a single, region-wide audit would be cost-efficient and help ensure the accuracy of the data. Staff, supported by the ALJ, did not oppose participation in the regional audit, but argued that the Commission should be able to withdraw if the needs of the state are not being met.[62] Qwest continues to believe that the Commission should participate in the region-wide audit funded through a Tier 2 fund, and the following language could be appended to the QPAP as an alternative audit provision:

15.0 Integrated Audit Program/Investigations of Performance Results

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62 *See* Staff's Final Report ¶ 208; *See* Recommended Decision ¶¶ 92-94.

15.1 Audits of the PAP shall be conducted in a two-year cycle under the auspices of the participating Commissions in accordance with a detailed audit plan developed by an independent auditor retained for a two-year period. The participating Commissions shall select the independent auditor with input from Qwest and CLECs.

15.1.1 The participating Commissions shall form an oversight committee of Commissioners who will choose the independent auditor and approve the audit plan. Any disputes as to the choice of auditor or the scope of the audit shall be resolved through a vote of the chairs of the participating commissions pursuant to Section 15.1.4.

15.1.2 The audit plan shall be conducted over two years. The audit plan will identify the specific performance measurements to be audited, the specific tests to be conducted, and the entity to conduct them. The audit plan will give priority to auditing the higher risk areas identified in the OSS report. The two-year cycle will examine risks likely to exist across that period and the past history of testing, in order to determine what combination of high and more moderate areas of risk should be examined during the two-year cycle. The first year of a two-year cycle will concentrate on areas most likely to require follow-up in the second year.

15.1.3 The audit plan shall be coordinated with other audit plans that may be conducted by other state commissions so as to avoid duplication, shall not impede Qwest's ability to comply with the other provisions of the PAP and should be of a nature and scope that can be conducted in accordance with the reasonable course of Qwest's business operations.

15.1.4 Any dispute arising out of the audit plan, the conduct of the audit, or audit results shall be resolved by the oversight committee of Commissioners. Decisions of the oversight committee of Commissioners may be appealed to a committee of the chairs of the participating Commissions.

15.2 Qwest may make management processes more accurate or more efficient to perform without sacrificing accuracy. These changes are at Qwest's discretion but will be reported to the independent auditor in quarterly meetings in which the auditor may ask questions about changes made in the Qwest measurement regimen. The meetings, which will be limited to Qwest and the independent auditor, will permit an independent assessment of the materiality and propriety of any Qwest changes, including, where necessary, testing of the change details by the independent auditor. The information gathered by the independent auditor may be the basis for reports by the independent auditor to the participating Commissions and, where the commissions deem it appropriate, to other participants.

15.3 In the event of a disagreement between Qwest and CLEC as to any issue regarding the accuracy or integrity of data collected, generated, and reported pursuant to the PAP, Qwest and the CLEC shall first consult with one another and attempt in good faith to resolve the issue. If an issue is not resolved within 45 days after a request for consultation, CLEC and Qwest may, upon a demonstration of good cause, (e.g., evidence of material errors or discrepancies) request an independent audit to be conducted, at the initiating party's expense. The independent auditor will assess the need for an audit based upon whether there exists a material deficiency in the data or whether there exists an issue not otherwise addressed by the audit plan for the current cycle. The dispute resolution provision of section 18.0 is available to any party questioning the independent auditor's decision to conduct or not conduct a CLEC requested audit and the audit findings, should such an audit be conducted. An audit may not proceed until dispute resolution is completed. Audit findings will include: (a) general applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation), (b) magnitude of any payment adjustments required and, (c) whether cost responsibility should be shifted based upon the materiality and clarity of any Qwest non-conformance with measurement requirements (no pre-determined variance is appropriate, but should be based on the auditor's professional judgment). CLEC may not request an audit of data more than three years from the later of the provision of a monthly credit statement or payment due date.

15.4 Expenses for the audit of the PAP and any other related expenses, except that which may be assigned under section 15.3, shall be paid first from the Tier 2 funds in the Special Fund. The remainder of audit expenses will be paid one half from Tier 1 funds in the Special Fund and one half by Qwest.

Regardless of whether the Commission chooses to pursue its own structured audits or participate in the regional audits, either type of audit should be paid for with Tier 2 payments. For this reason, Qwest proposes that upon acceptance of the QPAP, the Commission create a Special Fund for the purpose of distributing the Tier 2 funds, and earmarking a portion of that Fund for the independent audits described in section 11.0 of the QPAP. The new QPAP language creating the Special Fund is provided below, in connection with Disputed Issue No. 12.

Finally, the ALJ also states that "the CLECs' position that Qwest not be able to change the performance measurements and reporting system unless the Commission approves it in advance is also important and should be explicitly stated in the PAP."[63] This was never identified as an impasse issue or even discussed in the workshops. The proposal was filed first in WorldCom's opening brief, after the workshops had concluded.[64] The Commission should reject such efforts to propose new provisions that Qwest has had no opportunity to rebut in the workshops.

The pitfalls of such post-record proposals are readily apparent here. WorldCom noted that this particular issue arose in Colorado, but the actual state of proceedings in Colorado on this point is quite different than as portrayed by WorldCom. The Colorado PAP no longer requires Qwest to obtain approval for all changes it makes to its data gathering and collection process. While the Colorado Special Master originally recommended that Qwest be barred from making "any competitor-affecting change in its performance measurement and reporting system" without prior approval from the Commission,[65] he later substantially changed that recommendation in response to Qwest's concern "that the concept of 'CLEC affecting' leaves open substantial questions as to the extent of its flexibility to change its measurement system."[66] The Colorado

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63 Recommended Decision ¶ 94.

64 *See* Opening Brief of WorldCom and Z-Telecommunications Regarding Qwest Corporation's Performance Assurance Plan, *In the Matter of U.S. WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, ACC Docket No. T-00000A-97-0238 (May 10, 2001) at 37.

65 *See* Final Report and Recommendation, *In re Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 01I-041T (Colo. PUC June 8, 2001) at 5.

66 *See* Supplemental Report and Recommendation of the Special Master to the Public Utilities Commission of the State of Colorado, *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Docket No. 01I-041T (Colo. P.U.C. Feb. 15, 2002) at 2 ("Special Master's Supp. Report").

Commission has recently accepted his changes in this regard.[67] Qwest could not accede to the stranglehold on its business operations originally proposed in Colorado, and there is certainly no record basis for imposing it here after the issue was never raised in the workshops.

Indeed, if the ALJ is suggesting that Qwest should be required to seek approval for any changes to its performance measuring system, the implications are astounding. Almost any change, however minor, appropriate, or, indeed, necessary could change a numerator or denominator and thus potentially a result and ultimately a payment amount. Qwest routinely updates report data inputs such as USOC tables and NPA/NXX codes. This information is necessary in order for Qwest to capture all orders and tickets that are required by the PID definition. The updates might change the results. However, if Qwest does not make the change, Qwest would be deemed out of compliance with PID and would produce incorrect results. Qwest would be prohibited from making without approval those same changes that Qwest is explicitly charged with making. As noted above, the Colorado Special Master acknowledged these concerns, and they are equally applicable here, as the same processes that apply to Colorado apply to Arizona. Thus, there is no basis in this record for considering WorldCom's post-hearing suggestion for such a provision.

Disputed Issue No. 12: Tier 2 Payments

The QPAP contains two types of payments: Qwest is obligated to make Tier 1 payments to CLECs if it "does not provide parity between the service it provides to the

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[67] *See* Decision on Remand and Other Issues Pertaining to the Colorado Performance Assurance Plan, *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance*

CLEC and that which it provides to its retail customers, or if Qwest fails to meet applicable benchmarks."[68] As an additional incentive, the QPAP also requires Qwest to make Tier 2 payments to the state.[69]

Staff has proposed that the Tier 2 payments should be used to "fund certain Commission activities, including" the costs of audits, post-271 monitoring of Qwest's compliance, and dispute resolution.[70] In its comments on Staff's reports, Qwest raised concerns about the Commission's authority to hold and direct the use of the Tier 2 funds.[71] Indeed, the Commission itself has recognized that there is substantial doubt as to whether the Commission has the authority to make expenditures from payment collections such as Tier 2 payments.[72]

Here, the ALJ states only that she "agree[s] with Staff and the CLECs that the Tier 2 payments should not benefit Qwest, but rather should be used to offset the costs of administering the PAP and furthering the goal of increased competition in Arizona."[73] The ALJ's decision on this issue is far from clear and does not provide Qwest with any clear indication of if and how the QPAP would need to be modified to respond to the decision. In addition, the Commission's ability to use the Tier 2 funds is, of course, contingent on its legal authority to hold the funds, and the Recommended Decision does not address this point.

Assurance Plan in Colorado, Docket No. 01I-041T (Colo. P.U.C. Mar. 27, 2002) at 8 ("Colorado Decision on Remand").

68 QPAP § 2.0.

69 *Id.*

70 *See* Recommended Decision ¶ 97.

71 *See* Qwest's Comments on Final Report at 23.

72 *See* Letter from William A. Mundell, Chairman, Arizona Corporation Commission, to Teresa Wahlert, Vice President, Arizona Operations, Qwest Corporation (Sept. 13 , 2001).

As noted above, Qwest does not believe that it is prudent to create unlimited funding for auditing or QPAP administration. However, assuming they are not inconsistent with Arizona law, Qwest is willing to incorporate the Utah stipulated PAP provisions that create funds held by Qwest with specifically identified uses. To address the concerns discussed above, Qwest is willing to incorporate the following language from the Utah plan into the QPAP:

> 11.3 Upon the execution of a memorandum of understanding with the Arizona Corporation Commission ("Commission"), an Arizona Special Fund and an Arizona Discretionary Fund shall be created for the purposes and in accordance with section 11.0. The Commission shall appoint a person designated to administer and authorize disbursement of funds. All claims against the funds shall be presented to the Commission's designate and shall be the responsibility of the Commission.
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> 11.3.1 Qwest shall establish the Arizona Special Fund and the Arizona Discretionary Fund as separate interest bearing escrow accounts. Upon Qwest receiving effective section 271 authority from the FCC for the state of Arizona, the Commission shall determine and direct Qwest to deposit into the Arizona Special Fund 50% of all Tier 2 payments. Qwest shall deposit any other Tier 2 payments into the Arizona Discretionary Fund. The costs of the escrow accounts will be paid for from the accounts' funds.
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> 11.3.2 The Arizona Special Fund shall be created to pay the independent auditor and audit costs specified in section 15. Other than the transfer of funds allowed in section 11.2.2.1, disbursements from the Arizona Discretionary Fund shall be limited to Arizona telecommunications initiatives. Any excess funds in the Arizona Special Fund may be transferred to the Arizona Discretionary Fund at the Commission's discretion.
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> 11.3.2.1 If the account balance of the Arizona Special Fund escrow account is less than $50,000 at the time of any audit described in section 15, a transfer of funds from the Arizona Discretionary Fund to the Arizona Special Fund shall be allowed in the amount necessary to bring the Arizona Special Fund balance to $50,000.

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[73] Recommended Decision ¶ 99.

Finally, the ALJ recommends that the Tier 2 payments also be used to "further[] the goal of increased competition in Arizona."[74] The Commission should make clear that any such provision should *not* be read as support for Staff's earlier proposal to use the Tier 2 funds to provide "aid for CLECs attempting to establish business within the Arizona market,"[75] which it appears to have abandoned in its Final Report.[76] Using Tier 2 funds to subsidize CLECs is flatly inconsistent with the goal of the 1996 Act to promote real facilities-based competition.[77] As Qwest pointed out in its comments on the Proposed Report, giving such funds to CLECs would actually *decrease* competition in the state. Because the Tier II payments are not tied to any harm suffered by CLECs, subsidizing CLECs in this manner would discourage them from investing in and developing their networks.

Disputed Issue No. 14: Plan Limitations

a. Election of Remedies/Offset

Sections 13.4 and 13.5 provide that the QPAP payments are "liquidated damages," and that such payments cannot be used as an admission of liability in another proceeding[78] and "are a reasonable approximation of any contractual damages that may

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74 Recommended Decision ¶ 99.

75 Staff's Proposed Report ¶ 176.

76 *See* Staff's Final Report ¶ 221.

77 *See* Third Report and Order ¶ 110 ("A fundamental goal of the Act is to promote investment and innovation by all participants in the telecommunications marketplace, and, in particular, to encourage rapid deployment of new telecommunications technologies. . . . Specifically, consumers benefit when carriers invest in their own facilities because such carriers can exercise greater control over their networks, thereby promoting the availability of new products that differentiate their services in terms of price and quality.") (citations omitted).

78 QPAP § 13.4.

result from a non-conforming performance measurement."[79] Section 13.6 properly precludes CLECs from obtaining remedies under both the QPAP and an alternative service obligation contained in a contractual provision, wholesale rules, or Commission orders. In other words, CLECs are not required to opt into the QPAP and its liquidated damages scheme. But if they do, they cannot receive payments from Qwest under both the QPAP and any alternative remedies scheme.

The ALJ argues that, because "[t]he purpose of the payments under the Plan is to encourage Qwest's compliance with the 1996 Act," the QPAP should not "foreclose CLECs from attempting to prove actual damages in excess of the assessments under the Plan."[80] For this reason, it argues, the QPAP payments are not "liquidated damages," and so all such references in sections 13.4 and 13.5 should be deleted.[81] The ALJ also finds that section 13.6, which prevents CLECs from recovering payments under both the QPAP and other rules or agreements for the same or analogous performance, should be deleted because it "is overly broad, vague, and ambiguous."[82]

Like traditional liquidated damages provisions, the QPAP establishes in advance what payments are appropriate compensation for damages due to Qwest's nonconformance. This payment structure satisfies the FCC's express requirement that a performance assurance plan contain "a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal."[83] CLECs that opt into the QPAP

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79 *Id.* § 13.5.

80 Recommended Decision ¶ 125.

81 *Id.* ¶¶ 125, 130.

82 *Id.* ¶ 135.

83 *Bell Atlantic New York Order* ¶ 433.

therefore will receive payments from Qwest for nonconformance with the QPAP metrics without litigation — *and without ever having to claim, prove, or incur any harm.*

This remedy is designed to be the only remedy under "rules, orders, or other contracts, including interconnection agreements, arising from the same or analogous wholesale performance."[84] This is nothing more than the logical implication of traditional liquidated damages provisions, which require the parties to agree in advance on an amount of damages that reasonably approximates the anticipated harm. Like other election of remedies provisions, this one also ensures that CLECs cannot have their cake and eat it too by electing, on a case-by-case basis, to collect the liquidated damages amount when they can prove no harm and to pursue some higher amount when they seek to do so. To allow CLECs the option of taking the liquidated damages or suing for actual damages is inconsistent with the basic purpose of liquidated damages and would transform the payments simply into a floor for further litigation — in plain violation of the FCC's guidelines for self-executing plans. Indeed, under established legal principles, such an option would render a liquidated damages provision unenforceable because it liquidates nothing and thus operates only as a penalty.[85]

The ALJ's view[86] that the QPAP payments should not operate as liquidated damages also directly contradicts the view of the FCC. As Staff has recognized,[87] prior

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[84] QPAP § 13.6.

[85] *See, e.g., Gary Outdoor Adver. Co. v. Sun Lodge, Inc.*, 650 P.2d 1222, 1225 (Ariz. 1982) (invalidating liquidated damages clause on grounds that it operated as a penalty); *see also* J. Calamari & J. Perillo, *The Law of Contracts* § 14-32, at 594 (4th ed. 1998) (collecting cases and noting that clauses which "attempt to fix damages in the event of a breach with an option on the part of the aggrieved party to sue for actual damages," referred to as a "Have Cake and Eat it Clause," have been "struck down as they do not involve a reasonable attempt definitively to estimate the loss"); *Grossinger Motorcorp, Inc. v. American Nat'l Bank and Trust Co.*, 607 N.E.2d 1337, 1347 (Ill. Ct. App. 1992); *Dalston Constr. Co. v. Wallace*, 214 N.Y.S.2d 191, 193 (NYDC 1960).

[86] *See* Recommended Decision ¶¶ 122, 125.

FCC-approved plans have consistently recognized that PAP payments are appropriately treated as such. The Texas plan and subsequent SBC plans expressly refer to Tier 1 payments as "liquidated damages."[88] The Multistate Facilitator likewise recognized that "it is not reasonable to allow CLECs to keep Tier 1 base payments and Tier 1 accelerated payments when it suited them, but to seek more when it did not."[89] As he further observed,

> The QPAP represents a comprehensive payment structure for compensating CLECs for harm. They have the right to elect all of it or none of it. It would not be reasonable to allow them to select those portions of it that are on balance more favorable than other remedies, while choosing to take other remedies in cases where they are more favorable. Qwest has no right to do so; a proper sense of balance with respect to liquidated damages should require the same of CLECs.[90]

The payments under the QPAP are not trivial or insignificant. Indeed, they are extremely robust payments that are more than compensatory to CLECs. Base Tier 1 payments for services vary between $25 and $150 depending on the type of measurement and escalate up to $400 or $800 depending on the duration of non-conforming performance (*e.g.*, all order/provisioning and maintenance/repair metrics have "high" payment levels that vary between $150 and $800 depending on the duration of non-conforming performance). Moreover, a single service can generate multiple payment opportunities due to the many activities that are measured in association with ordering provisioning and maintaining services. In fact, the total payments for all measurements

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87 *See* Staff's Final Report ¶¶ 265-66.

88 *See* section 6.1 of the Texas, Kansas, Oklahoma, Arkansas, and Missouri PAPs.

89 Multistate Facilitator's Report at 33.

90 *Id.*

for which a single service might qualify range from $750 in the first month to $5,600 in the sixth month of nonconforming performance.

Moreover, the ALJ's attempt to characterize the QPAP's liquidated damages as merely incentives to Qwest, not compensation to CLECs,[91] is simply incorrect, and appears to reflect a view of QPAP payments as "free money" with no corresponding obligations on CLECs. In fact, Tier 1 payments are designed to function as compensatory damages to CLECs. Otherwise, there would be no reason to make any payments to CLECs; all payments would be made to the state. While Tier 1 payments also act as a financial incentive for Qwest to provide service that conforms with the performance standards, the incentive effect on Qwest does not change the fundamentally compensatory purpose of these payments vis-à-vis CLECs.

In short, the ALJ's approach would result in a pure windfall to CLECs that is completely at odds with recognized legal principles governing liquidated damages. For these reasons, the ALJ's elimination of the election requirement in the QPAP is also inappropriate. This provision requires CLECs to choose the standards and remedies for which Qwest will be accountable upfront. There is no logical or legal basis for requiring Qwest to provide CLECs with multiple standards or remedies for the same performance, and such a concept is inherently inconsistent with the entire structure of the PAP. The election provision does not preclude CLECs from opting in advance to rely on alternative standards or remedies. It simply requires the CLEC to choose which shall apply in advance of accepting the relevant services. This is simply an obvious corollary of any liquidated damages scheme.

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[91] *See* Recommended Decision ¶ 125.

Qwest also cannot agree to the ALJ's demand that section 13.6 be "deleted."[92] Section 13.6 establishes that Qwest has a right of offset where the prerequisite of "the same or analogous wholesale performance" is satisfied. This is a critical provision, designed to permit CLECs to pursue noncontractual (*e.g.*, tort or antitrust) remedies, while ensuring that they cannot be used as a vehicle for double recovery. Whether the prerequisite to offset is met in any given case (*i.e.*, whether the noncontractual claim involves "the same or analogous wholesale performance") would be a question presented to the court for its resolution prior to its award of damages. Thus, as the Multistate Facilitator recognized, "If Qwest's language is adopted, nothing in it gives Qwest the right to make an unreviewable decision about whether an offset is allowable."[93] In this respect, QPAP § 13.6 is no different from Texas § 6.2. The only difference is that under section 13.6 the court or other entity hearing the dispute would have a clear legal standard to apply in resolving the question whether offset is appropriate. Clearly establishing this standard falls within the FCC's "zone of reasonableness" by avoiding future litigation about the matter.

b. Six-Month Review

The ALJ argues that "the Commission should have the ability to review and modify all the terms of the PAP" at the six-month review.[94] Qwest simply cannot agree to the ALJ's unduly broad proposal permitting the Commission *carte blanche* to rewrite the balanced compromise carefully negotiated by Qwest in the workshops. As the

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92 *Id.* ¶ 135.

93 Multistate Facilitator's Report at 35. While the offset language considered by the Facilitator was slightly different, the fundamental nature of the provision — that it establishes a binding standard for applying an offset — is the same.

Multistate Facilitator has recognized, Qwest will face substantial financial risk under the terms of the QPAP, and Qwest is entitled to a minimum level of certainty and finality regarding the extent of its obligations.[95] Giving the Commission the unlimited authority to change every facet of the QPAP in the future would remove any sense of certainty from the plan. It would also render meaningless all of the workshops that have been devoted to developing the QPAP terms, and involve a waiver of legal rights wholly inconsistent with plans approved in Texas and its progeny.[96]

As the Multistate Facilitator recognized, Qwest's reliance on prior FCC-approved restrictions on such modifications was well within the FCC's "zone of reasonableness." The SBC plans provide well-defined criteria for the six-month reviews. They specify the scope of the review, the standard for making changes, and the authority to determine those changes.[97] The QPAP provision has identical features. The Texas plan requires "mutual agreement" to "[a]ny changes to existing performance measures and this remedy plan," though it permits arbitration of new measurements and their classification.[98] The

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94 Recommended Decision ¶ 148.

95 *See* Multistate Facilitator's Report at 10.

96 Qwest's inability to accede to such a provision was the very subject of a recent remand by the Colorado Commission to its Special Master and negotiation with the Utah Advocacy Staff. But the Colorado Remand and the stipulation that resulted from the Utah negotiation resulted in modifications that were designed to identify areas that could be changed and those that were not subject to change rather than imbuing the Commission with the authority to make changes as it deemed fit. *See* Special Master's Supp. Report at 17-22; Colorado Decision on Remand; Stipulation Between Advocacy Staff and Qwest Regarding Performance Assurance Plan, *In the Matter of the Application of Qwest Corporation for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B)*, Docket No. 00-049-08 (Utah P.S.C. Mar. 27, 2002) ("Utah Stipulation"). The Utah modifications are discussed below.

97 *See* Texas PAP § 6.4; *see also* section 6.4 of the Kansas, Oklahoma, Arkansas, and Missouri PAPs.

98 Texas PAP § 6.4.

Qwest plan similarly provides that "[c]hanges . . . shall not be made without Qwest's consent."[99]

Moreover, as Qwest has repeatedly pointed out in this proceeding, neither Arizona law nor the 1996 Act gives the Commission the authority to impose, much less modify, the QPAP without Qwest's consent. First, nothing in Arizona law gives the Commission authority to require Qwest to make payments directly to CLECs, as the QPAP requires.[100] While ARS §§ 40-424 requires parties to "comply with any order . . . of the commission," that provision would not apply here because the Commission's decision regarding the QPAP will be a recommendation to the FCC on Qwest's section 271 application for Arizona, and not an "order" arising out of a state law proceeding. Indeed, Staff appeared to acknowledge as much in its Proposed Report, relying on the 1996 Act to "override any Arizona statute which may limit the Commission's powers."[101] And to provide a unilateral right to modify an agreement would also be inconsistent with long established principles of state common law governing the enforceability of such commitments.[102]

Nor does the 1996 Act give the Commission any such authority. Nothing in the Act requires a BOC to adopt a performance assurance plan in order to receive section 271

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99 QPAP § 16.0. Qwest also notes that nothing in the QPAP gives the Commission any sort of general authority to modify the plan *outside* of the six-month review, and Qwest respectfully requests that the Commission make it clear that any effort to do so would be flatly inconsistent with the terms of the QPAP.

100 *See* Qwest's Comments on Final Report at 12-13. Qwest also pointed out in those comments that imposing the QPAP on Qwest would be inconsistent with basic principles of contract law and would raise significant due process concerns. *See id.* at 13-14.

101 Staff's Proposed Report ¶ 237.

102 *See Shattuck v. Precision-Toyota, Inc.*, 566 P.2d 1332, 1334 (Ariz. 1977) (en banc) ("'Parties are, within reason, free to contract as they please, and to make bargains which place one party at a disadvantage; but a contract must have mutuality of obligation, and an agreement which permits one party

approval. While the FCC has stated that the implementation of a PAP is "probative evidence" that the BOC will continue to meet its obligations after receiving 271 approval,[103] the FCC has *never* stated that missing PIDs established in a PAP constitutes a violation of the Act.[104] Indeed, the parties may have agreed to standards that *exceed* the requirements of the 1996 Act. For these reasons, Staff's claims that the Commission can simply impose new QPAP terms on Qwest with or without Qwest's consent have no basis in law.

In an effort to resolve this issue, Qwest offers to expand an analogous six-month review provision further proposed by the Multistate Facilitator to provide further flexibility for Commission changes, as reflected in the joint stipulation between Qwest and the Utah Advocacy Staff.[105] That proposal would limit the six-month review to the subject of the performance measurements, but the Commission would have the authority to resolve any disputes concerning the addition, deletion, or modification of the measurements. However, in order to provide Qwest with some financial certainty with regard to changes made at the six-month review, a payment "collar" would limit Qwest's liability resulting from any changes arising out of the review to 10% of the total monthly payments that Qwest would have made in lieu of such changes. The new six-month review provision would read as follows:

> 16.1 Every six (6) months, beginning six months after the effective date of Section 271 approval by the FCC for the state of Arizona, Qwest,

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to withdraw at his pleasure is void.'") (*quoting Naify v. Pacific Indem. Co.*, 76 P.2d 663, 667 (Cal. 1938); *Stevens/Leinweber/Sullens, Inc, v. Holm Dev. & Mgmt, Inc.*, 795 P.2d 1308, 1313 (Ariz. Ct. App. 1990).

[103] *SBC Kansas/Oklahoma Order* ¶ 269.

[104] In light of the FCC's repeated statements that it has never required BOC applicants to demonstrate that they are subject to a PAP before granting 271 approval, *see, e.g.*, *SBC Kansas/Oklahoma Order* ¶ 269, it is hard to imagine how non-conformance with a PAP standard could violate federal law.

[105] *See* Utah Stipulation, Attachment 1 at 7.

> CLECs, and the Commission shall participate in a review of the performance measurements to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to move a classification of a measurement to High, Medium, or Low, Tier 1 or Tier 2. The criterion for reclassification of a measurement shall be whether the actual volume of data points was less or greater than anticipated. Criteria for review of performance measurements, other than for possible reclassification, shall be whether there exists an omission or failure to capture intended performance, and whether there is duplication of another measurement. Any reclassification of performance measurements must be approved by Qwest. Any disputes regarding adding, deleting, or modifying performance measurements shall be resolved pursuant to a proceeding before the Commission and subject to judicial review. No new performance measurements shall be added to this PAP that have not been subject to observation as diagnostic measurements for a period of 6 months. Any changes made at the six-month review pursuant to this section and as a result of a final non-appealable decision shall upon finality apply to and modify this agreement between CLEC and Qwest.
>
> Qwest shall not be liable for making any payments under the QPAP that result from changes made pursuant to the preceding paragraph and section 16.3, that exceed 10% of the monthly payments that Qwest would have made absent the effect of such changes as a whole. Such payment limitation shall be accomplished by factoring the payments resulting from the changes to ensure that such payments remain within 10% of the payments Qwest would have made absent such changes.

Of course, any Commission order arising out of the six-month review requiring changes to the performance measurements would be subject to any administrative and judicial review applicable to such an order.

Disputed Issue No. 15: Data Timeliness

The Staff also demands that Qwest adopt the $5,000 per day penalty for late reports included in SBC's Texas plan.[106] That payment scheme is unreasonable for several reasons. First, there is no evidence in the record that late reports would harm CLECs. Second, the $5,000 per day penalty is not required to give Qwest incentive to

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106 *See* Recommended Decision ¶ 156.

file its reports on time; if Qwest is not able make its payments to CLECs on time because of late performance reports, Qwest is already obligated under the QPAP to pay interest on those payments.[107] Finally, because Qwest is approaching its 271-authorization process on a region-wide basis, and will be developing reports for all of its 14 states on a consolidated basis, the combined penalty for missing a single day's report deadline for all 14 states at $5,000 per day would be $70,000. This amount on its face is unreasonable, and is especially onerous for a violation where there is no evidence of any CLEC harm.

As Qwest pointed out in its comments on Staff's Final Report, it is willing to adopt as a compromise the Multistate Facilitator's resolution of this issue: a $500 per day penalty after the five business day grace period, escalating to $1,000 per day after a week and $2000 per day after two weeks.[108] That revision of the Multistate QPAP reads as follows:

> In the event Qwest does not provide CLEC and the Commission with a monthly report by the last day of the month following the month for which performance results are being reported, Qwest will pay to the State a total of $500 for each business day for which performance reports are 6 to 10 business days past the due date; $1,000 for each business day for which performance reports are 11 to 15 business days past the due date; and $2,000 for each business day for which performance results are more than 15 business days past the due date. If reports are on time but are missing performance results, Qwest will pay to the State a total of one-fifth of the late report amount for each missing performance measurement, subject to a cap of the full late report amount. These amounts represent the total payments for omitting performance measurements or missing any report deadlines, rather than a payment per report. Prior to the date of a payment for late reports, Qwest may file a request for a waiver of the payment, which states the reasons for the waiver. The Commission may grant the waiver, deny the waiver, or provide any other relief that may be appropriate.[109]

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107 *See* QPAP § 15.1.

108 Multistate Facilitator's Report at 86.

109 Multistate QPAP § 14.3.

Disputed Issue No. 16: ARS § 40-424

Finally, the Staff suggests that ARS §§ 40-424 gives the Commission the authority to impose the QPAP without Qwest's consent.[110] As discussed above, that provision of Arizona law does not give the Commission authority to require Qwest to make payments directly to CLECs, as the QPAP requires.[111] Section 40-424 applies only to a Commission "order," not a recommendation to the FCC, and only permits the Commission to impose fines, which the QPAP payments clearly are not.

CONCLUSION

For the reasons stated above, the ALJ's Recommended Decision should be modified as set forth in these comments.

Respectfully submitted this 17th day of April, 2002.

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110 *See* Recommended Decision ¶ 160-61, ¶¶ 79, 148.

111 *See* Qwest's Comments on Final Report at 12-13. Qwest also pointed out in those comments that imposing the QPAP on Qwest would be inconsistent with basic principles of contract law and would raise significant due process concerns. *See id.* at 13-14.

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